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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 747

WALTER E. TAYLOR, JR., Trustee in Bankruptcy for B. SAM ENGRAM, Bankrupt,

Petitioner,

versus

MRS. MABEL DELL ENGRAM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

T. T. MOLNAR,
Cuthbert, Georgia,
Counsel for Petitioner.

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an appendix, designated as Appendix I, filed with this petition. The United States Court of Appeals adopts PER CURIAM the opinion of the District Judge, filed January 19, 1957, which is not yet reported and for convenience is printed in an appendix, designated as Appendix II, filed with this petition.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judiciai Code as amended, United States Code 28:347(a), 43 Stat. 938.

The judgment and opinion of the Court of Appeals for the Fifth Circuit were filed October 22, 1957; petition for rehearing was filed November 21, 1957; rehearing was denied without opinion on December 10, 1957. Application for stay of mandate pending application in this Court for writ of certiorari was made on December 26, 1957; and order staying the mandate for thirty days pending the application for writ of certiorari in this Court was entered on December 26, 1957.

QUESTIONS PRESENTED.

The Court of Appeals affirmed the judgment of the United States District Court for the Middle District of Georgia, which reversed the judgment and decree of the Referee in Bankruptcy, proceeding in this matter by general reference from the District Court. The Referee in

Bankruptcy permanently enjoined the prosecution of a proceeding instituted by Mrs. Mable Dell Engram, Respondent, mother of the bankrupt, in the Court of Ordinary of Clay County, Georgia, the same being a court of probate, for the setting aside twelve months support to Respondent, as the widow of Samuel Franklin Engram, out of the estate of the deceased who died intestate. The bankrupt, B. Sam Engram, being an heir of said Samuel Franklin Engram, the Referee in Bankruptcy held that the proceedings commenced by Respondent in the State Court have been instituted as a result of a collusion between Respondent, and her son, the bankrupt, for the sole and only purpose of hindering, delaying and defrauding the creditors of said bankrupt, thus depriving the courts of the United States of their jurisdiction and the effect of their judgment. Such proceedings, if successful, would effectively place the assets of the bankrupt beyond the reach of the Court and the creditors.

The District Judge reversed the Referee in Bankruptcy and directed said Referee to sustain a motion by Respondent to dismiss the ancillary petition of the Trustee and the creditors praying that the proceedings in the State Court be enjoined. The District Judge ruled that a United States Court is without jurisdiction to enjoin proceedings in a State Court notwithstanding that the proceedings in the State Court have been instituted as a result of a collusion for the sole purpose of defrauding creditors of the bankrupt and to deprive a Court of the United States of its jurisdiction and prevent it from effectuating its judgment. The Court of Appeals affirmed this ruling of the District Court.

The fundamental question presented in the petition is whether 62 Stat. 968, 28 U.S.C. 2283, Act June 25, 1948, c. 646, providing that a court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgment, confers upon a United States court, sitting in bankruptcy, jurisdiction to enjoin proceeding in a State court of probate which was instituted for the sole purpose of defrauding creditors of a bankrupt and to deprive the United States Court of its jurisdiction. The Referee in Bankruptcy having held, unreversed, that the widow did not intend to make the application for twelve months support out of the estate of her husband, has had several years' support out of the estate prior to the filing of the application, has further received large sums of money which she has converted to her own use, has agreed to the application for twelve months support only upon the insistence of her son's attorneys, her son being the bankrupt, has caused appraisers to value the property at $4,500.00, whereas the true value of the property is approximately $45,000.00, the question presented in this petition is whether, admitting all these facts, a United States Court is without jurisdiction to enjoin fraudulent proceedings in the State Court.

STATEMENT OF THE CASE.

The basis for Federal jurisdiction is the proceeding in bankruptcy in the United States District Court for the Middle District of Georgia.

The essential facts are contained in the petition for adjudication of B. Sam Engram as bankrupt, the ancillary petition of the creditors and the trustee in bankruptcy praying an injunction against Mrs. Mabel Dell Engram, mother of the bankrupt, and the motion filed by Mrs. Engram to dismiss the ancillary petition for want of jurisdiction. (R. 1-20.) The case was heard by the Referee in Bankruptcy to whom the matter was referred by the United States District Judge by general order of reference. The Referee in Bankruptcy found, after extensive hearings, that Mrs. Mabel Dell Engram was the widow of Samuel Franklin Engram and the mother of the bankrupt; that the widow collected substantial sums of money out of her husband's estate as temporary administratrix, —Samuel Franklin Engram having died intestate,—and that she converted these sums to her own use; that the bankrupt is her son and an heir of Samuel Franklin Engram; that respondent, in addition to the large sums of money which she received out of the estate of her husband, has received support out of the estate from November 9, 1952 until March 8, 1955, more than two years, without applying to the Court of Ordinary, which is a probate court, for a judgment setting aside to her twelve months support. On March 8, 1955 she filed such application upon the insistence of her bankrupt son's attorneys and had appraisers appointed on the same day, as is provided by Georgia law. On the same day said appraisers made a report, setting aside practically the whole estate. The bankrupt had one-third interest in the estate and this one-third interest is of the value of $16,000.00 The appraisers valued practically the whole estate at $4,000.00 and have set aside the same to Mrs. Engram, Respondent.

The appraisers were selected by the attorneys of the bankrupt who also handled the case for Mrs. Engram. On June 15, 1956 the Referee in Bankruptcy issued a judgment and decree, finding among others the above stated facts, conclusions, and enjoining respondent permanently from prosecuting her application in the State Court, there being no judgment rendered in the State court as yet. The Referee in Bankruptcy further held and adjudicated that the proceedings in the State Court were initiated for the sole purpose of hindering, delaying and defrauding the creditors of B. Sam Engram, bankrupt, and, therefore, should be enjoined. (R. 21-30.)

Respondent petitioned the District Court to review the judgment of the Referee. On review, the District Judge reversed the Referee in Bankruptcy on the sole ground that a United States Court lacked jurisdiction to enjoin proceedings in the State court, though the proceedings may be fraudulently brought. (R. 50-64.) He directed the Referee to sustain the motion to dismiss the ancillary petition.

The trustee appealed to the United States Court of Appeals for the Fifth Circuit. On October 22, 1957 the Court of Appeals "Per Curiam" affirmed the judgment of the District Court without writing an opinion except agreeing with the reasoning of the District Court. (R. 72-73.) A motion for rehearing was denied without an opinion on December 10, 1957. (R. 76-79.)

REASONS FOR GRANTING THE PETITION.

The United States Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

Specifically, the question involves the jurisdiction of the United States Court to enjoin proceedings in the State court where the proceedings in the State Court have been instituted or the sole purpose of depriving that United States Court of jurisdiction and for the purpose of nullifying its judgment. In bankruptcy court, this has the effect of concealing the assets of the bankrupt and placing the same beyond the reach of the bankruptcy court. Should the judgment of the District Court be allowed to stand, it would completely nullify the Bankruptcy Act.

Until the present case came to be heard, this question has never been decided. The District Judge, in his elaborate decision, cited numerous cases. His basic points are as follows:

a. Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause. (R. 55.)

b. If the proceeding in the State Court is to try title or assert a lien against specific property not affected by bankruptcy, the State Court has priority of jurisdiction as against the bankruptcy Court. (R. 60.)

c. This case may be likened to a case where only one of three partners is adjudicated a bankrupt. (R. 61.)

d. Where a husband, who is the principal beneficiary of the estate of his deceased wife, was adjudged a bankrupt pending the administration of his wife's estate in the State Probate Court, the latter Court was not ousted of the possession of the wife's estate by the bankruptcy of the husband, but retained jurisdiction to make disposition of the assets of the wife's estate according to law. (R. 63.)

e. Where the jurisdiction of a court, and the right of plaintiff to prosecute this suit in it, have once attached, that rignt can not be arrested or taken away by proceeding in another court. (R. 55-56.)

Of the many, many cases cited by the Court and counsel, none involved question of fraud or collusion, except *Muffler vs. Petticrew Real Estate Co.*, 6th Cir., 132 F. 2nd 479 (7) where the question of fraud was incidentally involved, it being charged that the executor attempted to defraud an heir, not the court, nor creditors, and the Court held that such charge did not give a Federal Court jurisdiction over the matter.

Petitioner contended that the following principles govern this case:

a. Equity has inherent power to grant relief against a judgment on the ground of fraud, especially if it was practiced on the court, inducing it wrongfully to assume jurisdiction. . . . The power of equity in this respect is

inherent. 49 C.J.S. 732, #372. Fraud affects fatally even the most solemn judgments and decrees. *Nudd vs. Burrows*, 91 U.S. 426. Fraud will vitiate any judgment. *Kieley vs. McGlynn*, 21 Wall 503, 22 L.Ed. 599.

It is a familiar doctrine that a judgment of any court may be attacked and set aside on the ground that it was procured through fraud practiced upon the court by the party promoting the proceedings. A judgment may be impeached for the purpose of showing that it was procured by the debtor for the purpose of avoiding the operation of the Bankruptcy Act *Micheals vs. Post*, ,88 U.S. 398, 22 L. Ed. 520.

b. Section 2283 of Title 28, U.S. Code does not forbid a court of the United States to grant an injunction where necessary in aid of its jurisdiction or to protect or effectuate its judgment. *D. G. Bland Lumber Company vs. National Labor Relations Board*, 177 F. 2nd 555. The bankruptcy court may not only enjoin the officers of the State courts but may stay the proceedings in the Courts themselves when necessary to enforce their jurisdiction to administer bankruptcy assets. *McLaughlin vs. Knop*, 214 F. 260. A referee in bankruptcy has power to enjoin a state officer in enforcement of a state statute if necessary to prevent defeat or impairment of his jurisdiction. *In Re Davis Standard Bread Co.*, 46 F. Supp. 841. Bankruptcy courts in matters of bankruptcy may be authorized to interfere by injunction with proceedings in State Courts. *In Re Moore*, 42 F. 2nd 475; *Scott vs. Goodman*, 24 F. 2nd 175; *In Re Diversey Bldg. Corp.*, 86 F. 2nd 456, certiorari denied 300 U.S. 662.

CONCLUSION.

Two basic and important legal principles have met in this case and are in conflict. The rule that where the jurisdiction of a court has once attached, that right can not be arrested or taken away by proceedings in another court is in conflict with the basic rule of law that fraud vitiates even the most solemn judgment of the highest Court and Section 2283 of Title 28, U.S. Code does not forbid a court of the United States to grant an injunction where necessary in aid of its jurisdiction or to protect or effectuate its judgment. This question has never been resolved and it has never been decided which of the two rules must yield to the other.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit should be granted.

T. T. MOLNAR,
Cuthbert, Ga.,
Attorney for Petitioner.

APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16560

WALTER E. TAYLOR, JR., Trustee in Bankruptcy for B. SAM ENGRAM, Bankrupt,
Appellant,

versus

MRS. MABEL DELL ENGRAM,
Appellee.

Appeals from the United States District Court for the Middle District of Georgia.

(October 22, 1957.)

Before HUTCHESON, Chief Judge, and BORAH and CAMERON, Circuit Judges.

PER CURIAM: This is an appeal by the trustee from an order of the district judge which, reversing for want of jurisdiction the order of the referee, enjoining Mrs. Mabel Dell Engram, the mother of the bankrupt, from proceeding with her application in the Court of Ordinary of Clay County, Georgia, for a statutory 12 months' support out of the estate of her deceased husband, bankruptcy's father, ordered the petition for injunction dismissed.

The sole question presented for our decision is whether the district judge erred in so holding. In his thorough and thoughtful opinion,[1] reviewing the proceedings which culminated in the referee's order and the petition for review, the district judge carefully and correctly set out the facts and as carefully and correctly canvassed the authorities and stated the applicable law.

In complete agreement not only with the disposition made by the district judge but with the reasons given in his opinion therefor, we find it unnecessary to further labor the matter, and, upon the considerations and for the reasons given in his opinion, we order his judgment AFFIRMED.

A true copy:

Test:

EDWARD W. WADSWORTH,
(Seal) Clerk, U. S. Court of Appeals,
Fifth Circuit.
By CLARA R. JAMES,
Deputy.

New Orleans, Louisiana.

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[1] In the Matter of B. Sam Engram, Bankrupt, ...F. Supp. .... (1-19-57).

JUDGMENT.

Extract from the Minutes of October 22, 1957.

No. 16,560.

WALTER E. TAYLOR, JR., Trustee in Bankruptcy for B. SAM ENGRAM, Bankrupt,

versus

MRS. MABEL DELL ENGRAM.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Walter E. Taylor, Jr., Trustee in Bankruptcy for B. Sam Engram, Bankrupt, be condemned to pay the costs of this cause in this Court in due course of the administration of the estate of said bankrupt.

APPENDIX II.

Filed at 11:00 A. M. Jan. 19, 1957.

In the United States District Court for the Middle District of Georgia, Columbus Division.

In the Matter of:

B. Sam Engram, Bankrupt.

#2313 & 2316.

Bootle, District Judge:

The petition for review, filed by Mrs. Mabel Dell Engram, the mother of the bankrupt, presents the question whether the Referee erred in permanently enjoining her from proceeding with her application in the Court of Ordinary of Clay County, Georgia, for a statutory twelve months support out of the estate of her deceased husband, bankrupt's father.

The record shows that bankrupt's father, Samuel Franklin Engram, died intestate on November 9th, 1952, leaving surviving him his widow, Mrs. Mabel Dell Engram, and two sons, one of whom is the bankrupt. On May 18th, 1953, the widow was appointed temporary administratrix. On March 7th, 1955, she made application for appointment as permanent administratrix. On March 5th, 1955, she made application to the Court of Ordinary for a statutory twelve months support under the provisions of Section 113-1002 of the Code of Georgia Annotated.

On March 30th, 1955, an involuntary petition in bankruptcy was filed against B. Sam Engram by three of his creditors and on the following day, March 31st, 1955, the same creditors filed in this Court their petition for equitable relief alleging that B. Sam Engram had been adjudicated a bankrupt and praying that bankrupt's mother, Mrs. Mabel Dell Engram, be enjoined from proceeding further with her application for a twelve months support. After the appointment of the Trustee in bankruptcy, he was made a party plaintiff in said petition for equitable relief and adopted the petition of the creditors. In the meantime, and, on March 8th, 1955, the appraisers, appointed by the Court of Ordinary for the purpose, filed their report with said Court setting aside certain real estate and household furniture as being necessary for the support and maintenance of said widow and valued at $4,500.00. In accordance with the regular procedure, the Court of Ordinary cited all persons concerned to show cause before the Court of Ordinary on the first Monday in April, 1955, why said application should not be granted.

Upon the filing of this ancillary petition for injunction, and on March 31st, 1955, this Court referred the same to the Referee "to take such further proceedings therein as are required and permitted by the Act of Congress relating to bankruptcy." The widow filed her motion to dismiss said ancillary petition contending that this Court lacks jurisdiction to enjoin her from proceeding with her petition for a year's support out of the estate of her deceased husband because:

"a. In so far as the property inherited by the bankrupt B. Sam Engram from his father is concerned, this Court can only deal with the title of the bankrupt and that title is inferior to a Year's Support for his mother out of his father's estate;

"b. The creditors of an heir cannot contest with the widow of the heir's intestate her right to a Year's Support out of the estate of said intestate;

"c. This Court is without jurisdiction to determine whether or not Mrs. Mabel Dell Engram should be awarded a year's support, and whether or not she had already received such a support at the time she filed her petition therefor;

"d. As appears from the allegations of the petition, the Year's Support had already been set aside to Mrs. Mabel Dell Engram at the time of the filing of the petition of Well Dairies Co-operative et al., in this Court, and there is no further act or thing which she can do in connection with the granting of the Year's Support, and therefore no act or conduct that can be enjoined."

The Referee never formally acted upon this motion to dismiss, but treated his findings of fact, conclusions of law and judgment, hereinafter mentioned, as having the effect of overruling said motion to dismiss. After a number of hearings, the Referee, on June 15th, 1956, made his findings of fact, finding the facts as hereinabove stated and additionally that bankrupt's

father left an estate of over 200 acres of land with a house and certain moneys and bonds; that the widow moved from said home after the death of her husband, but collected whatever rents there were for the years 1952 through 1955; that she made no application for a year's support prior to March 5th, 1955; that her application for appointment as temporary administratrix was for the purpose of collecting the proceeds of insurance, etc., and that she lived out of the moneys so collected; that she has made no accounting to the two sons for the personal property of the estate; that bankrupt was insolvent at the time when a petition for a receiver had been filed against him in the Superior Court of Randolph County on September 11th, 1955; that the widow never figured on claiming a year's support until after the filing of said petition for a receiver and that it was only at the insistence of the attorneys who represent both her and the bankrupt that she made a claim; that said application for twelve months support was made solely to hinder, delay and defraud the creditors of bankrupt who had a one-third interest in said estate of his father; that the widow, by her failure to claim a year's support earlier, is estopped from claiming it now to defeat bankrupt's creditors; that the appraisers set aside the entire estate of bankrupt's father with the exception of a small tract on the edge of the house and lot tract and that the part left was of only a few hundred dollars value (the evidence shows that the deceased owned something over 200 acres and that the appraisers set apart 58.08 acres, which, however, contained the improvements); that the moneys collected by the widow were spent by her as temporary

administratrix and were unaccounted for and was approximately the same amount as set apart to her and that she had had at least two years support out of the estate. The Referee then concludes as a matter of law that the application for the year's support was made for the deliberate purpose of hindering, delaying and defrauding bankrupt's creditors and, accordingly, he entered a judgment enjoining the widow permanently from proceeding any further with her year's support.

In the opinion of this Court the widow's motion to dismiss the ancillary petition for equitable relief should have been sustained, that the Referee erred in not sustaining it and that it is not necessary for the Court to express any opinion with respect to his findings of fact and other conclusions of law.

Under the rules of inheritance in Georgia the widow and two sons were entitled to inherit equally the decedent's estate. Georgia Code Annotated 113-903 (3) (4). Upon decedent's death the title to his real estate vested immediately in his widow and two sons "subject to be administered by the legal representative . . . for the payment of debts and the purposes of distribution." Georgia Code Annotated 113-901. The title to personalty vested in the administrator for the benefit of heirs and creditors. Georgia Code Annotated 113-901. The widow, however, was entitled also to a twelve months support which ranks "among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided . . ." Georgia Code Annotated 113-1002. As the widow's

attorneys frankly concede in their brief "of course, if Mrs. Engram had received one year's support she would not be entitled to take another under the statute." Moreover, "the laws of Georgia allow a widow one year's support for herself and children out of the estate of her deceased husband; . . . the laws do not contemplate that she shall live at the homestead and consume the provisions belonging to the estate and have a year's support in addition to what she may thus have consumed, allowed to her; . . . in all application for a year's support to be assigned her, she must be held chargeable with the value of what she had previously consumed." *Wells v. Wilder*, 36 Ga. 194. See also *Hill v. Hill*, 55 Ga. App. 500, 502 and *Smith v. Smith*, 73 Ga. App. 567, 572. Also, "Long lapse of time between the death of the husband and the widow's application for year's support may be considered by the ordinary in connection with other facts tending to show that the widow had received a support from the estate or had waived it expressly or impliedly. And in passing upon the application the ordinary should give weight to evidence as to such facts in determining the amount to be granted, or whether the application should be wholly refused." *Federal Land Bank v. Henson*, 166 Ga. 857 (5).

The fundamental rule of law applicable here is of such long standing that in the case of *Peck, et al., v. Jenness, et al.*, reported in 7 Howard 612, 48 U. S. 612, 12 L. Ed. 841, it was remarked, "It is a doctrine too long established to require a citation of authorities . . ." The rule of law referred to and the full quotation are:

"It is a doctrine of law too long established to require a citation of authorities, that, where a Court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other Court; and that, where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another Court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy v. The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either Court. The fact, therefore, that an injunction issues only to the parties before the Court, and not to the Court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

Other illustrative cases are *Kline v. Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226 and *Bryan v. Speakman*, 5th Cir., 53 F. 2d 463 (4). The latter case holds that where a bill for foreclosure and receivership was sanctioned and filed in State Court, that Court had custody of mortgaged property notwithstanding it had not yet appointed its receiver when bankruptcy receiver took possession. See also *Lion Bending and S. Co. v. Karatz*, 262 U. S. 77, 67 L. Ed. 871.

It was said in *International Bank v. Sherman* (1880), 101 U. S. 403, 406, 25 L. Ed. 866 and in *Mueller v. Nugent* (1901), 184 U. S. 1, 14, 46 L. Ed. 405, that the filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction. As was held, however, in the case of In Re Dayton Coal and Iron Company, 291 Fed. 390, 396, "This remark, however, must be taken with reference to the facts then before the Court and 'not as applicable to all intents and purposes'. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 353, 26 Sup. Ct. 481, 50 L. Ed. 782; *Jones v. Springer*, 226 U. S. 148, 155, 33 Sup. Ct. 464, 57 L. Ed. 161. Thus taken, its effect is: That the filing of the petition so impounds the property of the debtor then in his possession, that, as held in *Bank v. Sherman*, those who deal with it between the filing of the petition and the adjudication do so at their peril, and cannot acquire title thereto by transfer from the debtor; and that, as held in *Mueller v. Nugent*, the bankruptcy Court may summarily compel its surrender by one holding it merely as agent of the debtor. *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969." For a similar narrowing interpretation

of the "caveat" language of the Supreme Court, see *Linstroth Wagon Co. v. Ballew,* 149 Fed. 960, 965.

It is not to be gainsaid that a Court of the United States may in accordance with 28 U. S. C. A. 2283 grant an injunction to stay proceedings in a State Court where necessary in aid of its jurisdiction or to protect or effectuate its judgment. This is a jurisdiction, however, which, under the authorities, is to be cautiously exercised and, in the words of the statute, only when "necessary in aid of its jurisdiction, or to protect or effectuate its judgment." In the recent case of *Callaway v. Benton,* 336 U. S. 132, 93 L. Ed. 553, the Supreme Court held that in the Central of Georgia reorganization plan the question whether the acceptance of the offer by the Southwestern Railroad Company required a unanimous vote of its stockholders was for the State Court to decide and that the United States Court could not restrain a State Court action brought to enjoin the proposed sale. The Court said: "There can be no question, however, that Congress did not give the bankruptcy Court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." At page 142 U. S., page 561 L. Ed. Moreover, the Court pointed out in footnote 11 that even if the controversy had involved property within the exclusive jurisdiction of the bankruptcy Court, that court could, in its discretion, postpone action pending adjudication of the question in the State Court but withheld judgment as to whether, under such circumstances the bankruptcy Court would have had to withhold judgment. The *Callaway* case is right much in point factually The Central of Georgia was being reorganized in bankruptcy Court. It was

the owner of a leasehold interest on property of the Southwestern Railroad Company. It did not own the reversion. The reorganization plan extended to Southwestern the privilege of selling the reversion to the Central's trustee, if it so desired. The question arose in the State Court as to whether Southwestern could make such sale under its charter absent the unanimous approval of its stockholders. Such question to an extent and in some way affected the Central's estate in bankruptcy, but not sufficiently, under the Supreme Court's holding, to permit the bankruptcy Court to enjoin the State Court action. In the instant case, it must be remembered that the decedent's estate is not in bankruptcy. The mother is not in bankruptcy. The other brother is not in bankruptcy. The only bankrupt is B. Sam Engram, and the only property he owns, insofar as the immediate controversy is concerned, is a one-third undivided interest in the decedent's estate and that interest is subject to the expenses of administration, chief among which is a year's support for the widow, assuming that she has not already received the same or in some way lost her right thereto.

When the *Callaway* case was in the United States Court of Appeals for the Fifth Circuit en route to the Supreme Court, the Court of Appeals convincingly wrote: "We think the bankruptcy Court erred in attempting to exercise exclusive jurisdiction over property which the debtor did not own and upon which it had no lien. The debtor was in actual possession of the tangible property leased by it, but it held the same as lessee, not as owner in fee." *Benton v. Callaway*, 5th Cir., 165 F. 2d 877, 880.

The respective jurisdictions of State Courts and bankruptcy Courts are exhaustively treated in 28 Am. Jur., page 399, Injunctions, Section 216, et seq.; 6 Am. Jur., page 727, Bankruptcy, Section 297, et seq., including Sections 300 and 301, and in 8 Corpus Juris Secundum, page 924, Bankruptcy, Section 261, et seq.

A proceeding in a State Court to ascertain all of the debts and administer all of the property of an insolvent person, which is the essence of bankruptcy, or a proceeding which, though having a lesser scope, will be governed by an application of the Bankruptcy Act on the occurrence of bankruptcy, as where transfers and liens otherwise valid are nullified by bankruptcy, is suspended entirely by bankruptcy though prior in time to bankruptcy. But if the proceeding in the State Court is to try title or assert a lien against specific property not affected by bankruptcy, the State Court has priority of jurisdiction as against the bankruptcy Court. *In Re Moore*, D.C. N.D. Ga., 42 F. 2d. 475. See also *Scott v. Goodman*, D.C. N.D. Ohio, 25 F. 2d. 175. Similarly, a State Court suit pending at the onset of bankruptcy for recovery by a defrauded vendor of property purchased on credit by the debtor through a fraudulent credit statement can proceed unaffected by bankruptcy. *Lindstroth Wagon Co. v. Bailew*, *supra*. Analogously, though bankruptcy does not oust State Court of jurisdiction acquired in a receivership proceeding filed within four months of bankruptcy to enforce a lien more than four months old and hence not affected by bankruptcy, the bankruptcy Court has summary jurisdiction to order the State Court receiver to turn over to the bankruptcy trustee excess

funds left in the State Court receiver's hands after satisfaction of the lien. *Atlanta Flooring and Insulation Co v. Russell,* 5th Cir., 145 F. 2d. 493, petition for rehearing denied 146 F. 2d. 884; *Atlanta Flooring and Insulation Co. v. Oberdorfer Insurance Agency,* 5th Cir., 136 F. 2d. 457.

The reasoning in the above cited decisions applies to the instant case in that a widow's right to a twelve months support has priority over the bankrupt's claim as an heir. The bankrupt's inheritance was subject to the widow's claim for a year's support and remains subject thereto both before and after bankruptcy.

This case may be likened also to a case where only one of three partners is adjudicated a bankrupt. Such an assumed case is covered explicitly by Section 5 (i) of the Bankruptcy Act, which says that in such case, "the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt; but such general partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt." To the same effect, Collier on Bankruptcy, Volume 1 page 741 says, "The only interest that the trustee of an individual bankrupt partner has in partnership property in the hands of the unadjudicated partner is the right to demand and receive the partner's interest, if any, in the firm assets after an accounting and payment of debts out of property belonging to the partnership." See also *Market Oil & Gas Co. v. Staley,* 5th Cir., 218 Fed. 45 (3)

The Court of Ordinary is a Court of general jurisdiction *Stringfellow v. Stringfellow,* 112 Ga. 494, 495. The Court of Ordinary of Clay County, with the right of appeal from it to the Superior Court of said County, is the proper Court to administer the estate of the bankrupt's deceased father. As a part of that administration that Court can properly determine all questions raised and to be raised in reference to the widow's claim for a twelve months support. Said Court may have other questions of administration to resolve, for instance, whether or not the bankrupt has received any advancements within the meaning of Section 113-1013 of the Georgia Code Annotated, or is simply a debtor of the estate, and, in that connection, whether an administrator holding a claim against a bankrupt heir may enforce it only in the Court of bankruptcy, and whether an indebtedness of a bankrupt to the estate of his intestate father can, or cannot, be set off against his interest as an heir in real estate. See *In Re Von Ruden,* D.C. D. Minnesota, 22 F. 2d 860. But these are questions which may arise in the State Court and with which this Court is not presently involved. The bankruptcy trustee, if he is so minded, may with authorization from this Court intervene in the State Court proceedings, he being a privy of the bankrupt heir, *(McGahee v. McGahee,* 204 Ga. 91-96), and, as Judge Foster stated in the case of *McLoughlin v. Knop,* D.C. E.D. La., 214 Fed. 260, 263, "I have no doubt the State Court will give due consideration to his contentions . . and will ultimately decide all questions properly according to the law and evidence of the case." In the meantime, the final administration of the bankruptcy estate will have to await the administration of the bankrupt's father's

estate with respect to personally belonging to said decedent's estate and with respect to realty also, unless with respect to the real estate the Referee should decide that the bankrupt's interest therein may and should be sold subject to the right of the administratix therein for administration purposes, as was held in the case of *In Re Von Ruden, supra.*

The case of *Byers v. McAuley*, 149 U.S. 608, 37 L. Ed. 867, is doubly apposite holding both that where property is in the possession of one Court, of competent jurisdiction, such possession cannot be disturbed by process out of another Court and that a Federal Court has no original jurisdiction in respect to the administration of a deceased person, and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it.

Moreover, allegations of fraud, mismanagement or collusion on the part of the administratrix in the State Court matter does not affect the question of interference with the State Court's jurisdiction. *Muffler v. Petticrew Real Estate Co.*, 6th Cir., 132 F.2d. 479 (7).

Perhaps the case nearest in point is *In Re Naslund*, D.C. W.D. Wash. N.D., 6 F. Supp. 109, holding that where a husband, who was the principal beneficiary of the estate of his deceased wife, was adjudged a bankrupt pending the administration of his wife's estate in the State Probate Court, the latter Court was not ousted of the possession of the wife's estate by the bankruptcy

of the husband, but retained jurisdiction to make disposition of the assets of the wife's estate according to law. The cases of *Hull v. Dicks,* 235 U. S. 584, 59 L. Ed. 372, and *Seiden v. Southland Chenilles'*, 5th Cir., 195 F. 2d. 899, are of particular interest in that they deal with bankruptcy and with the widow's twelve months support under the Georgia statute. These cases hold nothing contrary to *In Re Naslund, supra,* and are clearly distinguishable in that in each case the bankruptcy Court had sole possession of the decedent's estate and were in no manner interfering with the jurisdiction or possession of State Courts. *In Re Rhodes,* D.C. N.D. Ohio, 190 Fed. 117 holds that a homestead set apart in a State Probate Court to one who later becomes a bankrupt is binding upon the bankruptcy Court. Many of the cases herein cited are discussed in the case of *In Re Burden,* D.C. D. Nebraska, 83 F. Supp. 416, which holds that under the modernization and revision of the Bankruptcy Act,. effected September 22nd, 1938, the Referee has summary jurisdiction to cancel execution liens obtained against an insolvent debtor within four months next prior to the filing of the petition in bankruptcy through judgment and the issue and levy of execution in the State Court.

For the reasons herein stated the judgment of the Referee that Mrs. Mabel Dell Engram be restrained and enjoined permanently from proceeding any further with the year's support is hereby reversed and upon return of the matter to him he is directed to enter an order sustaining her motion to dismiss the ancillary

petition for injunction insofar as it seeks to enjoin her from proceeding further with the application for twelve months support.

This 19 day of January, 1957.

W. A. BOOTLE,
United States District Judge

Filed Jan. 19, 1957.